

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 762 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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NARENDRA LABHSHANKAR

Versus

PATEL RAMJI MULJI, DECD. THRO' HIS HEIRS-UKA RAMJI  
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Appearance:

1. First Appeal No. 762 of 1980  
NANAVATY ADVOCATES for Petitioners  
MR SV RAJU for Respondent No. 1
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CORAM : MR.JUSTICE A.R.DAVE

Date of decision: 30/11/2000

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dated  
30.1.1980 passed in Special Civil Suit No.2/77 by the

Civil Judge (SD), Amreli, the appellants have approached this court by way of the present First Appeal.

2. The facts giving rise to the present appeal, in nut-shell, are as under:

2.1 For the sake of convenience, the parties to the litigation have been described as arrayed before the trial court.

2.2 Original plaintiff, late Shri Labhshanker Joshi filed Special Civil Suit No.2/77 against the defendants praying that the possession of the suit land which is admeasuring 11 acres 9 gunthas and forming part of S.No.221 situated at Keriyaganas, be directed to be given to the plaintiff along with mesne profits thereof. The case of the plaintiff in the plaint was that the plaintiff had agreed to sell the land in question for consideration of Rs.51,000/- to the defendants. An agreement to sell, dated 8.2.1973 was executed by the plaintiff. At the time of execution of the agreement to sell, a sum of Rs.10,000/- was paid to the plaintiff and the remaining amount of Rs.41,000/- was to be paid to the plaintiff before Magshar of S.Y.2030. At the time of execution of the agreement to sell, the possession of the land in question was handed over to the defendants. Out of the remaining amount, Rs.5,000/- were paid by the defendants to the plaintiff on 28.2.1973 and thereafter another agreement to sell dated 26.11.1973 was executed between the parties, and before the execution of another agreement to sell, in all a sum of Rs.35,000/- was received by the plaintiff from the defendants and it was agreed that a sum of Rs.16,000/- was to be paid by the defendants before Magshar Sudi bij S.Y.2031. Upon payment of the remaining amount of consideration, the sale deed was to be executed by the plaintiff. Thereafter, the defendants had paid Rs.4,000/- to the plaintiff and, thus, in all a sum of Rs.39,000/- was given to the plaintiff by the defendants. Again on 19.12.1974 another agreement to sell was executed wherein it was admitted that a sum of Rs.39,000/- was received by the plaintiff and a sum of Rs.12,000/- was to be paid by the defendants to the plaintiff before Magshar Sudi bij S.Y.2032 and upon payment of the said amount necessary sale deed was to be executed by the plaintiff in favour of the defendants. According to the plaintiff, it was also agreed that on the unpaid amount of consideration, interest at the rate of 1.5% p.m. was to be given by the

defendants. According to the plaintiff, though the plaintiff was ready and willing to execute the sale deed in favour of the defendants, as the defendants did not pay the remaining amount along with interest thereon, it was prayed in the suit that the possession of the land in question be handed over to him and mesne profits be awarded to him as the defendants were put in possession of the land in question.

2.3 Written statement was filed by the defendants (Exh.35) wherein the defendants had admitted the fact that three different agreements to sell had been executed by the plaintiff but they denied the fact that the defendants were not ready and willing to perform their part of duty, i.e. paying the remaining amount of consideration. According to the defendants, the land in question originally belonged to Bai Jivkunvar Mulji who had adopted Shri Labhshanker Joshi, who was the original plaintiff. The plaintiff and Bai Jivkunvar Mulji were staying together and the plaintiff was looking after the properties of Bai Jivkunvar. At the time when it was agreed that the land in question would be sold by the plaintiff to the defendants there was a charge created on the land in question as a sum of Rs.11,000/-had been borrowed by Bai Jivkunvar from Keriyagas Seva Sahakari Mandali Limited (hereinafter referred to as "the Society"). Upon knowing the fact with regard to the charge created on the land in question, the defendants had asked the plaintiff by notice dated 8.4.1976 that the plaintiff should get clear title of the land in question and upon getting the charge removed from the land in question, the defendants would pay the remaining amount of Rs.12,000/- to the plaintiff. It was the case of the defendants that they were put in possession of the land in question and therefore they were protected under the provisions of Sec.53A of Transfer of Property Act and as they were ready and willing to perform their part of duty, possession of the land in question could not have been taken from the defendants. It was also the case of the defendants that as the land in question was likely to be sold by holding an auction by the Society for recovery of its debt, so as to protect the interest of the defendants, they had paid a sum of Rs.11,075.25ps to the Society so as to remove the charge which was created on the land by the Society and the defendants were always ready and willing to pay the balance amount of consideration after deducting the amount paid by them for the purpose of removing the charge created on the land in question. Thus, sum and substance of the case of the defendants was that they were ready and willing to

perform their part of duty and as they had given Rs.11,075.25ps to remove the charge created on the land in question, they should be given credit of the said amount and they were ready and willing make payment of the balance amount to the plaintiffs. During the pendency of the suit, plaintiff Shri Labhshanker Joshi expired and thereupon his heirs, who are the present appellants, were joined as plaintiffs in the suit. After considering the pleadings, the trial court raised the issues at Exh.15 which are as under:

- (1) Whether the plaintiff proves that the defendants have committed breach of contract?
- (2) Whether the plaintiff is entitled to possession of the suit land from the defendants as alleged?
- (3) Whether the court fees are sufficiently affixed?
- (4) Whether the plaintiff is entitled to get the reliefs as prayed?
- (5) What order and decree?

2.5 The trial court, after considering the pleadings and evidence adduced, dismissed the suit by coming to the conclusion that the plaintiffs could not prove that the defendants had committed breach of the contract. In the circumstances, the trial court held that the plaintiffs were not entitled to possession of the suit land from the defendants.

2.6 Before coming to the said conclusion the trial court had looked into the Exhs.Nos. 36, 37 and 38 which are agreements to sell dated 8.2.1973, 26.11.1973 and 19.12.1974 respectively which were executed by the original plaintiff. The trial court also looked into the Exh.41-the sale deed which was executed by Bai Jivkunvar Mulji in favour of the original plaintiff whereby land admeasuring 11 acres 30 gunthas was sold by Bai Jivkunvar Mulji to the original plaintiff on 1.3.1971 for a sum of Rs.5,000/-. On behalf of plaintiffs, Narendra Labhshankar was examined vide Exh.44. On behalf of the defendants, defendant No.2 had been examined (Exh.46). Shri Ranchhod Devraj (exh.54) who was an attesting witness to the agreement to sell of the land in question was examined. The President and Secretary of the Society were also examined (Exhs 49 and 51 respectively). Notice dated 21.3.1976, which was addressed by the Society to the defendants being Exh.50, was also looked into by the

trial court. Moreover, Exh 34-notice addressed by the defendants to the original plaintiff was also considered by the trial court.

2.7 The trial court came to a conclusion that the charge was created on the land in question by Bai Jivakunvar Mulji and the land in question was to be auctioned for the purpose of recovering the dues of the Society and therefore the defendants were constrained to pay the dues of the society, which were Rs.11,075.25ps. The President and the Secretary of the Society, in their evidence clearly revealed that the charge was created on the land as different amounts were lent to Bai Jivakunvar Mulji prior to effecting sale in favour of the original plaintiff and as the said amount could not be repaid to the society, the land in question was to be sold under the provisions of Bombay Land Revenue Code. The recovery officer was also appointed and an auction was also to be notified. In the circumstances, to protect the land in question from being disposed of at an auction and in the interest of defendants, the defendants had paid the amount of Rs.11,075.25ps. to the Society. There is no dispute about the fact that a charge was created on the land in question before the agreement to sell was executed in favour of the defendants. It is also not in dispute that the amount payable to the Society to clear the charge created on the land in question the defendants had paid Rs.11,075.25ps. Considering the fact that the defendants-vendees were supposed to get the land in question without any charge thereon as per the agreement to sell and as per the provisions of Transfer of Property Act. As the said charge was not removed by the plaintiff or his heirs and as the defendants were ready and willing to perform their part of duty, the trial court held that the defendants were entitled to retain the possession of the land in question under the provisions of Section 53A of Transfer of Property Act. The court came to conclusion that the plaintiff was duty bound to clear the charge because the plaintiff was bound to give clear title of the land in question to the defendants, but having failed to do so the plaintiff had no right to recover the possession of the land in question.

3. During the pendency of the suit one of the heirs of original plaintiff Shri Labhshanker Joshi, Shri Narendra Labhshanker also expired. As heirs of Narendra Labhshanker have not been brought on record, the appeal so far as Narendra Labhshanker and his heirs are concerned, stands abated.

4. Ld.Advocate-Ms.Mitha Panchal appearing for the appellants-plaintiffs has submitted that the trial court has erred in law as well as in facts while dismissing the suit. She has submitted that as no charge was created on the land at the instance of the plaintiff, it was not the duty of the plaintiff to remove the charge. According to her, there was no understanding between the parties that the charge created on the land in question would be removed by the plaintiff. In the circumstances, as per the submission made by her, it was not necessary for the plaintiff to make any payment to the society and in the circumstances, it was also not necessary for the defendants to pay to the Society a sum of Rs.11,075.25ps and as the said amount was paid by the defendants to the society voluntarily, the defendants were not entitled to adjustment in respect of the said amount and the defendants were bound to pay the balance amount of Rs.12,000/- to the plaintiff or his heirs for getting the sale deed executed in their favour. She has reiterated that the plaintiff was ready and willing to execute the deed provided a sum of Rs.12,000/- was paid to the plaintiff by the defendants. Thus, she has mainly submitted that the trial court was in error while considering the fact that upon payment of a sum of Rs.11,075.25ps to the society by the defendants, the defendants were entitled to get credit of the said amount and then they were liable to pay that much amount less to the plaintiff or his heirs.

5. On the other hand, Ld.Advocate Mr.Pandya appearing for the defendants has submitted that it was the duty of the plaintiff to give clear title of the land in question to the defendants. As stated hereinabove, it is not in dispute that the charge had already been created on the land in question when the agreement to sell had been entered into between the plaintiff and the defendants.

6. Section 55 of the Transfer of Property Act, 1982 deals with the rights and liabilities of the buyer and the seller. According to the provisions of Section 55 of the Act, in the absence of a contract to the contrary, the buyer and the seller of immovable property are subject to the liabilities, and have the rights, mentioned in the said section. According to the provisions of section 55(1)(g) of the Act, the seller is bound to pay all public charges and the rent accrued due in respect of the property upto the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is subject to

encumbrances, to discharge all the encumbrances on the property then existing. Ld. Advocate Shri Pandya has submitted that in the instant case the suit property had not been sold subject to encumbrances and therefore it was the duty of the plaintiff to discharge all the encumbrances on the property which were in existence. As the plaintiff did not discharge the encumbrance, which was in the nature of a charge of the Society on the land in question, the defendants had to discharge the said encumbrance, because had they not done so, the land in question would have been auctioned by the Recovery Officer appointed under the provisions of the Bombay Land Revenue Code by the Society.

7. It is definitely not in dispute that the land in question was to be auctioned as the charge created thereon had not been cleared by the plaintiff or his predecessor in title Bai Jivakunvar Mulji. In the circumstances, so as to retain the possession of the land in question, the defendants had to discharge the encumbrance and therefore they had to make the payment.

8. In the circumstances, as stated hereinabove, it can not be said that the defendants were not ready and willing to perform their duty under the agreement to sell because the defendants were ready and willing to make payment of the unpaid amount to the plaintiff. As the defendants were put in possession in pursuance to part performance of the first agreement to sell dated 8.2.1973, they were rightly protected by the trial court and therefore the suit for possession filed by the plaintiff was dismissed.

9. Looking to the facts of the case and upon perusal of the judgment and the evidence adduced before the trial court, I do not think that the trial court has committed any error while dismissing the suit. In the circumstances, I do not see any reason to interfere with the conclusions arrived at by the trial court and therefore the appeal is dismissed with no order as to costs.

30.11.2000 (A.R.DAVE,J)